In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 149

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE COLORADO AND SOUTHERN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY FOR THE UNITED STATES TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The brief in opposition argues (pp. 6-11) that the United States is not authorized to petition for a writ of certiorari in this case, because it is not a creditor "affected" by the plan, as defined in Section 706 of the Bankruptcy Act (Pet. 20). We believe there is no substance to the argument.

Section 745 of the Bankruptcy Act (Pet. 31) provides that any final order or decree of the special court may be reviewed by this Court upon application for certiorari made by any person affected

by the plan who deems himself aggrieved within 60 days after entry of the order or decree. The right to petition for certiorari is thus not limited to "creditors" who are "affected' by the plan within the meaning of Section 706, as taxpayer contends.

The findings of fact, conclusions of law, and judgment entered April 29, 1949, of which the petition for certiorari asks review, denied the right to the United States to assess and collect 1942 and 1943 taxes claimed to be due because *inter alia* such taxes were not included as a liability of the taxpayer when the plan of adjustment was approved in 1943, and their assessment and collection now would jeopardize the effective execution of the plan of adjustment. This judgment was a final judgment and under Section 745 any final judgment or decree may be the subject of an application for certiorari, not merely the original decree approving the plan. (Cf. Br. in Opp. 9) Since under the District Court's judgment the United States is prevented by the plan from assessing and collecting taxes claimed by it, the United States is clearly a person affected by the plan, and deeming itself aggrieved by the judgment, is authorized to petition for certiorari under the plain language of Section 745. This right exists whether or not the United States was a "creditor" affected by the plan, but we also believe that the United States was a creditor.

At the time of the original decree approving the plan entered March 8, 1943, the United States was

not a creditor claiming taxes, as the District Court then found. Subsequently, however, liability for 1942 and 1943 income and excess profits taxes arose and the United States gave notice of proposed additional taxes due for those years and declined to settle the proposed liabilities in accordance with taxpayer's protest. At the time the supplemental petition was filed on October 4, 1948, the United States was thus asserting claims for taxes from the petitioning taxpayer. It was then a creditor under Section 705(4) of the Bankruptcy Act. (Pet. 20.) See also Sections 722 (Pet. 25-26) and 738 (Pet. 31.) The District Court's judgment has of course prevented assessment of the taxes claimed by the United States.

Section 706 in terms provides that no creditor shall be deemed to be affected by any plan unless the plan proposes to modify the evidence of debt or other instrument defining the creditor's rights, or to modify the creditor's security, if any, for the claim. A complete elimination of the claim would patently be a "modification" under this section. But in any case, it is obvious that the section can relate and apply only to claims of creditors which are evidenced by a written document or are secured. It seems apparent that, where Congress did not expressly define the circumstances in which other kinds of creditors would be deemed to be affected by the plan, such question is left to judicial determination, and that such creditors are affected by the plan where their claims are dealt with and are

reduced, modified, or eliminated. Certainly there is no basis in Section 706 for imputing to Congress an intention to eliminate unsecured creditors without written evidence of the debt from the right to petition for certiorari where the plan of adjustment, as approved, reduces, modifies, or expunges entirely their claims.

The claims of the United States for taxes in this case are not evidenced by written document and are not secured. Section 706 therefore has no application. The claims were, however, rejected altogether, not on the merits but on the basis of the supposed *res judicata* effect of the former decree approving the plan, because they would jeopardize the plan already approved. Thus, the claims were affected, that is, defeated, by the plan. It follows that the United States, as a creditor at the time of the supplemental petition, was granted the right to petition for certiorari with respect to the judgment entered on the supplemental petition under Section 745, even if the narrow view urged is taken that only creditors may apply for certiorari under that section.

The fact that Congress did not amend the bill to provide that all claims of the United States are to be deemed to be affected by a plan under Chapter XV of the Bankruptcy Act, as suggested by the Assistant Tax Legislative Counsel of the Treasury to the Special Subcommittee on Bankruptcy and Reorganization of the House Judiciary Committee (Br. in Opp. 6-8), does not compel the con-

clusion that Congress intended that the United States was never to have a right to petition for certiorari under Section 745, in view of the language used in the section. As shown, it expressly gave the right to apply for certiorari to all persons affected by the plan who deem themselves aggrieved and, in the circumstances here, this includes the United States under any interpretation of Section 745. Failure to adopt the suggested amendment would at most be one circumstance to be weighed with others, were the choice as to the meaning of the statutory language nicely balanced. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. Here, however, there is nothing to support the view that Congress intended to withhold from the United States the right to petition for certiorari in circumstances where it is affected by the plan and feels aggrieved.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
HELEN GOODNER,
Special Assistants to the Attorney General.

OCTOBER, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 837044 399